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No. 03-826

IN THE

Supreme Court of the United States

DIANA L. READ,

Petitioner,

v.

ALEX BROWN, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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I. THE FIFTH CIRCUIT DID NOT APPLY *DESERT PALACE* IN ITS SUMMARY JUDGMENT ANALYSIS, CREATING A SPLIT IN THE CIRCUITS.

Respondent's Brief in Opposition contains two central flaws on question one of the Petition for Certiorari. First, instead of showing that the Fifth Circuit somehow actually applied *Desert Palace* in its summary judgment analysis, Respondent notes that *Desert Palace* specifically held that circumstantial evidence of discrimination supports a mixed motive jury instruction. (Brief in Opp. 16) Respondent then

effectively concedes Petitioner's point, that *Desert Palace* applies in the summary judgment process by stating:

> First, a determination must be made, *initially by the judge as gatekeeper* and then by the jury, whether there is sufficient evidence of discriminatory motivation; and second, if so, whether the employer would have made the same decision absent the discriminatory motivation. The burden of proof in the first inquiry is on the plaintiff; and on the second, the defendant.

(Brief in Opp. 16, emphasis added) But then Respondent ignores the fact that the Fifth Circuit, in *Read*, failed to apply *Desert Palace* in its gatekeeper role. *Desert Palace* flatly holds that circumstantial evidence is equal to direct evidence. The Fifth Circuit *did not* utilize this ruling in its analysis. Instead, the Fifth Circuit, in *Read*, did this: (1) it rejected Petitioner's evidence in the form of five ageist and/or sexist statements as either not direct evidence or, meaningless direct evidence due to "vintage," then, without further ado (2) it applied a pretext analysis under *McDonnell Douglas-Burdine* (Pet. App. 5a).

Under this approach, the Fifth Circuit avoids the summary judgment impact of *Desert Palace*. In her discrimination suit, Petitioner has two proof mechanisms available. First, she can directly persuade the court that a discriminatory reason motivated the employer's adverse employment decision, using either direct or circumstantial evidence. The second method of proof is the pretext analysis under *McDonnell Douglas-Burdine*. *See Hill v. Lockheed Martin Logistics Management, Inc.*, _F.3d._, 2004 WL 25018, *3-5 (4th Cir. 2004).

Under *Desert Palace*, Read's evidence of five discriminatory statements, even if these statements are only circumstantial evidence, entitles Read to a jury trial on motivation (a trial where the employer has the burden of proving that it would have made the same decision absent the discriminatory

motivation). *Read* is a quintessential mixed motive case. Given the evidence of Jeff Rupp's hostility toward "old" brokers and his preference for young men in the Dallas office, coupled with his opportunity in December 1998 to get rid of the oldest female in the Dallas office (Diana Read) as part of cost cutting, the jury must determine if Rupp would have fired Read as part of cost cutting absent his discriminatory animus toward her. Using pre-*Desert Palace* analysis, the Fifth Circuit in *Read* failed to acknowledge that even if not "direct" evidence, these statements go directly to the real motive of Respondent. They indicate that from the moment Jeff Rupp became Diana Read's manager, he thought she was too old and he preferred young men in the Dallas office.

The second central flaw in Respondent's Brief in Opposition is its assertion that Read fails to demonstrate a split in the circuits on whether *Desert Palace* applies to summary judgment proceedings. Respondent's main devise is an apparent assumption that the Fifth Circuit decision in *Read* does not count in determining if there is a split in the circuits. (Brief in Opp. 17). In *Read*, the Fifth Circuit ruled that where a discrimination plaintiff does not have "direct evidence" (per its definition, and indeed, recent direct evidence), she has no evidence of discrimination under the direct proof method and she must live or die under a pretext analysis. Besides the cases mentioned in at Pet. 11-12, the Fourth and Ninth Circuits, in contrast to the Fifth Circuit, have now applied *Desert Palace* in their summary judgment analysis. *Stegall v. Citadel Broadcasting Co.*, __ F.3d __, 2004WL 26582, *4-6 (9th Cir. 2004); *Hill v. Lockheed Martin Logistics Management, Inc.*, _F.3d._, 2004 WL 25018, *3-5 (4th Cir. 2004).

II. RESPONDENT CONCEDES THERE IS A SPLIT IN THE CIRCUITS ON WHETHER *DESERT PALACE* APPLIES TO THE ADEA AND ARGUES WITHOUT MERIT THAT BECAUSE THE FIFTH CIRCUIT'S RULING APPLIED *DESERT PALACE* TO THE ADEA, THE SPLIT IN THE CIRCUITS IS IRRELEVANT.

As Petitioner has argued (Pet. 12-16), the courts are split on whether *Desert Palace*, a Title VII case, applies to age discrimination under the ADEA. This question is fundamental to judicial efficiency as age discrimination cases come forward for summary judgment rulings, jury instructions and appellate review.

Apparently forgetting that *Desert Palace* itself is a case where a circuit court (the Ninth Circuit), turned out to be right but where the circuit court decision created a split in the circuits, Respondent's one paragraph discussion on question two argues that since the Fifth Circuit in *Read* ruled that the same evidentiary procedure for allocating burdens of production and proof apply to Title VII and the ADEA, the question of whether *Desert Palace* applies to the ADEA is "a mere academic exercise." That may be true as to the parties in *Read*, but the point of question two in this petition for certiorari is that *Desert Palace* and *Reeves* leave open an argument that different production and proof procedures apply. Commentators immediately warned of this dispute. A district court in the Sixth Circuit has flatly, but without analysis, ruled that *Desert Palace*, a Title VII case, does not apply to age discrimination cases. *Bolander v. BP Oil Co.*, __ F.Supp.2d __, 2003 WL 22060351 (N.D.Ohio, 2003). Unlike the question of whether the *McDonnell Douglas* framework, developed under Title VII, applies under the ADEA, a question that the Court has never squarely addressed, the question of whether *Desert Palace* applies to the ADEA as

well as Title VII, since it can be outcome determinative, really must be answered.

III. DEPENDING UPON THE COURT'S ANSWER TO QUESTION ONE IN THE PETITION, THE SPLIT IN THE CIRCUITS OVER THE DEFINITION OF DIRECT EVIDENCE IS NOT ACADEMIC.

Respondent incorrectly asserts that there is not a split in the circuits on the definition of direct evidence. A split in the circuits was, after all, one of the bases for this Court to grant certiorari in *Desert Palace*. *Desert Palace v. Costa*, __ U.S. __, 123 S.Ct. 2148, 2155, fn. 3 (2003).

Moreover, depending on the Court's answer to question one of this petition, the definition of direct evidence is neither a "fine distinction," nor irrelevant. (Brief in Opp. 18) If the Court answers question one by holding that *Desert Palace* applies to summary judgment analysis, the Fifth Circuit's dictionary definition, the harsh standard required to shift the burden of proof to the employer, will be irrelevant, since either direct or circumstantial evidence that the employer's adverse employment decision was motivated by sex (or age, depending on the answer to question two) discrimination entitles the plaintiff to a jury trial with a burden shifting instruction. If the Court holds on question one that *Desert Palace* has no place in summary judgment analysis (affirming the Fifth Circuit approach in *Read*), the definition of direct evidence is critical. If Petitioner had direct evidence, she goes to trial. Without direct evidence, her fate depends on the gatekeeper's pretext analysis.

Respondent misreads footnote 13 of the Fifth Circuit's decision in *Read* (Compare Brief in Opp. 18 *with* Pet. App. 13a). The Fifth Circuit's footnote cannot reasonably be interpreted as a holding that a claimant with "direct evidence" per *Price Waterhouse* cannot get to a jury (with the burden of proof now on the employer to show it would have taken the

same adverse employment action absent the discrimination). Footnote 13 is more likely the panel's way of saying that without sufficient proof of pretext, "three comments" (there were really five) are insufficient proof in its view of unlawful motive. This evidence weighing view is mere dicta, given the first paragraph of footnote 13 (Pet. App. 12a-13a). If the last paragraph of footnote 13 (Pet. App. 13a) is really a holding that where an employer's evidence of a nondiscriminatory reason is sufficient to preclude submission of a case to a jury on a pretext theory, the direct proof of motivation method is unavailable, the Fifth Circuit has staked out a position in conflict with this Court and every other circuit.

IV. THERE IS A SPLIT IN THE CIRCUITS BECAUSE THE FIFTH CIRCUIT DOES NOT FOLLOW *REEVES*.

A. The Fifth Circuit's "Vintage" Ruling Conflicts with *Reeves*.

Jeff Rupp, the manager who made the decision to fire Diana Read in 1998, told her in 1995 at a breakfast meeting Read invited Rupp to attend after he had ignored her since she had been hired (by Mike Crossley) that "when brokers get older, they slow down" and that he considered her to be "one of the old ones." Respondent adopted the Fifth Circuit tactic of reducing two statements to one and argues (Brief in Opp. 20) that the Fifth Circuit was correct in ruling that the Jeff Rupp's "comment was not probative because it occurred at the beginning of her tenure *and* because she presented evidence of no other similar comments during her four-year tenure." (*Id.* Emphasis in original.)

Reeves requires the court in summary judgment proceedings to draw all reasonable inferences in favor of the non-moving party and in the light most favorable to her. Respondent makes the bare argument that there is no conflict in the circuits. Neither Respondent, nor the Fifth Circuit, can

dispute the fact that the "vintage" ruling hinges on an inference favoring Respondent that Rupp's age bias against Read somehow (without explanation, or indeed testimony from Rupp) went away between the time he told Read how he felt about old brokers and about her being old and the time Rupp decided to fire Diana Read. Since the Fifth Circuit gives mere lip service to *Reeves*, while other circuits adhere to its holding, there is an important split in the circuits.

B. The Fifth Circuit's "Substantial Evidence" Test Conflicts with *Reeves*.

The Fifth Circuit's ruling on how it can grant summary judgment despite evidence of pretext conflicts with *Reeves*. *Reeves* generally allows discrimination complainants with evidence of pretext to go to trial, setting forth narrow exceptions (see Pet. 24-25). While it is true that Petitioner (Pet. 25) cited only one sentence of two where the Fifth Circuit used the term "substantial evidence," it is not true that leaving out the second sentence mischaracterizes the Fifth Circuit's opinion, as Respondent argues (Brief in Opp. 20). Using the exact devise (a partial quote) that Respondent accuses Petitioner of using, Respondent argues:

> In this discussion, the Fifth Circuit properly states that "where the plaintiff . . . produces evidence permitting only an indisputably tenuous inference of pretext, summary judgment in favor of the defendant is appropriate."

(Brief in Opp. 20-21). When read in full, while the second sentence of the Fifth Circuit discussion ("produces evidence permitting only an indisputably tenuous inference of pretext") is akin (albeit watered down) to some of this Court's language, the Fifth Circuit links its tests with the word "or," so that a court has the right, per the Fifth Circuit (but not per *Reeves*) to grant summary judgment where the plaintiff has sufficient evidence of pretext but does not "produce substantial evidence that the defendant's non-discriminatory

reason is merely a pretext for impermissible discrimination." This is different from the narrow guidelines set in *Reeves* and favors the movant. *Reeves* gave specific guidance:

> Thus, a plaintiff's prima facie case, combined with ***sufficient*** evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated.
>
> This is not to say that such a showing by the plaintiff will *always* be adequate to sustain a jury's finding of liability. Certainly there will be instances where, although the plaintiff has established a prima facie case and set forth ***sufficient*** evidence to reject the defendant's explanation, ***no rational factfinder could conclude that the action was discriminatory. For instance***, an employer would be entitled to judgment as a matter of law if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision, *or* if the plaintiff created only a *weak* issue of fact as to whether the employer's reason was untrue ***and there was abundant and uncontroverted independent evidence that no discrimination had occurred***.

Reeves, 120 S.Ct. at 2109 (italics in original; bold italics supplied). The Fifth Circuit, in conflict with *Reeves* and the other circuits, substitutes the word "substantial" for the word "sufficient" used by this Court. These are different words with important differences and different meanings. In the context of *Reeves*, sufficient means sufficient. Sufficient does not mean substantial.

C. The Fifth Circuit's Willingness to Ignore Petitioner's Evidence and to Accept the Spin on the Evidence of the Summary Judgment Movant Conflicts with *Reeves*.

Respondent, along with the Fifth Circuit, misses the point of *Reeves* when it argues that "Read's real complaint is that the Fifth Circuit failed to accept her 'spin' on the evidence." (Brief in Opp. 21, citing Pet. 27)

Here is the point, one that shows that the Fifth Circuit has rejected the holding in *Reeves* that the court on summary judgment is not free to weigh evidence or to ignore evidence favorable to the movant. Per *Reeves*, whether the movant or the court likes it or not, so long as it is reasonable, the court indeed must give the evidence the "spin" favorable to the nonmovant and cannot accept the spin of the movant. Petitioner pointed the district court and the Fifth Circuit to Read's testimony, with page references to the record (Pet. 27) showing that Respondent absolutely changed its stated reason for terminating her after she pursued her discrimination claim. This is classic pretext evidence.

The fact that Respondent can spin the evidence by citing the court to a different page in the Read deposition transcript that (while in no way contradicting the testimony Read showed to the district court and the Fifth Circuit and that they ignored) is not as specific, does not free those courts to ignore Read's more specific testimony and focus on the transcript page Respondent prefers. It is one thing for a jury to weigh the evidence this way. *Reeves* says the courts cannot behave this way. It would be appropriate for this Court to bring the Fifth Circuit into line with *Reeves* and the circuits that treat *Reeves* as good law.

CONCLUSION

Petitioner respectfully prays that the Court grant certiorari on her four questions.

Respectfully submitted,

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